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ABSTRACT

According to this memorandum, from 1963-1967 all 50 states adopted laws that required certain groups of people to notify public authorities of suspected child maltreatment. In all but a few states, a child is defined as anyone under the age of 18. By May of 1980, all states but Vermont had reporting statutes that mandate reporting by teachers, principals, school personnel, and any other person. This memorandum is devoted to the sometimes overlapping legal issues and subsequent recommendations for the principal in the area of child abuse and neglect. The legal issues discussed are (1) the definition of negligence; (2) civil liability implications for a person who fails to report and the liability penalty; (3) a principal's legal duty to instruct faculty members on the requirements of child abuse and neglect statutes; (4) immunity from prosecution to persons reporting child neglect or abuse in good faith; and (5) whether a report to a given social service or law enforcement agency (of a suspected case of child abuse) violates the concept of confidentiality of records. Due to the fact that the requirements of reporting laws differ in each state, tables compiling information developed by the National Center on Child Abuse and Neglect are included that show, by state, who must report and reporting procedures. (Author/MLF)

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A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

1904 Association Drive

Reston, Va. 22091

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November 1980

Child Abuse and Neglect

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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The fact that abused and neglected children may be found in every community across the nation is compelling reason for educators to become involved in child abuse and neglect treatment and prevention.

-- *Diana Broadhurst*

An analysis of the data available on home-centered child abuse and neglect in our country is both tragic and revealing. The National Center on Child Abuse and Neglect has estimated that there are over 200,000 cases of physical abuse and over 800,000 of neglect per year involving the children of our country. While the specific figures are difficult to come by due to differences in such things as definitions, varying state laws, and particularly the concern that all cases are, in fact, not reported, the Center maintains that these figures are a "conservative middle ground estimate" and do not include such things as the some 60,000-100,000 young people per year who are sexually abused. Even granted these alarming numbers, the greater horror is the realization that more than 2,000 young people per year die in circumstances which suggest abuse or neglect.[1]

While these numbers certainly reflect the critical nature of the problem, recent research has contradicted the thought that the issues of child abuse and neglect are limited to the very young. In fact, new studies ". . . now indicate that more than half of the abused and neglected children in America (probably more than 500,000 nationwide) are of school age."[2]

A formal role for schools and school personnel in the identification and reporting of incidents involving possible child abuse and neglect appears to be lacking any clear description until the early 1960s when state laws were developed throughout the country to deal with the needs of "battered" and "maltreated" children. The reasons for this somewhat benign posture appear to range from lack of desire to get involved in problems of the family to a poor understanding of identification and what to do if and when one finds a concern to be legitimate. From 1963-1967, all 50 states adopted reporting statutes...that is, laws that require certain groups of people to notify public authorities of suspected child maltreatment with the upper age limit in all but a few states[3] established at the age of 18.

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By May of 1980, all states but one[4] have reporting statutes that mandate reporting by teachers (including principals so-defined), and/or "other school personnel" and/or "any other person." The importance of the role of the school and its principal is made quite clear in the HEW publication entitled The Educator's Role in the Treatment of Child Abuse and Neglect which states:

> *Schools are the only places in which children are seen daily over periods of time by professionals trained to observe their appearance and behavior. Not only does the school setting offer a continuum of time for observation, it offers the unique opportunity to compare and contrast behaviors which are unusual with those which are not unusual.*[5]

Whatever the historical misgivings about the schools' non-involvement in the issue, contentions that ignorance of the law is no excuse, plus the key statutorily defined role the principal and other school personnel may play in the prevention of child abuse and neglect place both a moral and legal onus on the principal to act. But what of the legal issues, such as notifying the relevant agency in a given state, and then having it shown that there was no abuse or neglect? Can the principal (or other school personnel) be sued for filing a "false" report? Can the principal be held liable for not reporting a suspected case that becomes even a more critical problem later? Is there a legal requirement to report? What are the penalties if a report is legally required but not made? What about the implications of the federal Family Educational Rights and Privacy Act (Buckley-Pell Amendment), if I release information about potential child abuse or neglect without parental written consent, am I violating the law? And so on. It is to these sometimes overlapping legal issues and subsequent recommendations for the principal in the area of child abuse and neglect that the remainder of this Memorandum is devoted.

NEGLIGENCE

As noted in the January 1975 Memorandum entitled "Negligence -- When Is the Principal Liable?" negligence may be defined as "the failure to exercise that degree of care which, under the circumstances, the law requires for the protection of other persons ...." In addition, negligence is basically the absence of care which is an act of commission (doing something you shouldn't have) or omission (not doing something you should have).

Whether the administrator lives in a state where he/she is specifically designated as a mandated reporter (e.g. Illinois)[6] or generally designated under provisions such as those of Texas[7] which require "any person having knowledge of...abuse or neglect"[8] to report or in a state which has both specific and general reporting statutes (e.g. Nebraska)[9] the failure to obey a statutory duty "in itself" establishes a negligent act of omission under common law[10, 11, 12] unless there are specific statutory exceptions.[13]

Fortunately, principals have not yet been the essential target of suits for failing to report a suspected case of child abuse. That dubious distinction has been conferred upon physicians, but some appropriate conclusions might be drawn for school principals.

In Robinson v. Wical, M.D., et al.,[14] a mother and a boyfriend brought her twelve-year-old son to a hospital twice in a 12 hour period with severe injuries, and the hospital reported neither case to appropriate agencies. One day later, the couple brought the child to a second hospital with what was found to be permanent brain damage. The boy's father sued the first hospital and others for negligence in failing to report the case. The case was eventually settled out of court for $600,000.

The civil liability implications of a person who fails to report under a state reporting statute was further discussed in the leading case of Landeros v. Flood.[15] After his examination, a physician was sued in this case for failing to recognize the child's condition as child abuse and for failure to report the case. Subsequent to the examination, the child was returned to her parents and received further injuries. While the trial court dismissed the complaint, the California Supreme Court ruled that a doctor and a hospital may be liable for malpractice for failure to report a suspected case of child abuse.

Another key area of concern for the principal is whether there is a legal duty to "instruct" his/her faculty on the requirements of child abuse and neglect statutes. To date this question has not been specifically addressed by the courts, but it is clear that the administrator has a moral and legal responsibility to see students in school protected and a professional responsibility to improve the competence of his staff.

Courts are especially solicitous in protecting minors. Since the major purpose of child abuse reporting statutes is to prevent the repetition of abuse, the risk of harm to an abused child is obviously exacerbated by the failure of a teacher who lacks comprehension of a statutory duty to report or who misunderstands the duty. It is the unique and special relationship with minors that may make teachers and principals liable simply for failing to act.

The key legal concept in this relationship is foreseeability. In the case of Cox v. Barnes (469 S.W. 2d. 61, 1971), a principal was exonerated from liability in a drowning incident because he required that a class taking a field trip to the beach be accompanied by a faculty member trained in life-saving. The presence of child abuse is so widespread that its occurrence in any school may well be foreseeable. Failure of an administrator to take reasonable preventive measures, including instructions of his/her staff on the reporting of child abuse and neglect, could very well bring the principal within the perimeter of potential liability.

WHAT IF I AM FOUND NEGLIGENT?

Although 33 states[16] provide a criminal penalty for those mandated reporters failing to report, there are few, if any, cases of a criminal prosecution for failure to report an abused or neglected child. In general, the failure to report is considered a misdemeanor with penalties of from up to five days to six months in jail and/or fines up to $1000. Typically, however, provisions in these laws limit liability to cases in which "willful" failure or some similar action is found to exist.

AM I IMMUNE IF I REPORT A CASE AND AM WRONG?

In 1974, the Child Abuse Prevention and Treatment Act (P.L. 93-247) was enacted by the federal government. This law created the National Center on Child Abuse and Neglect, and provided for grants to the states for treatment and prevention of child abuse and neglect. In order to receive grants, states must develop reporting laws that include provisions giving immunity from prosecution to persons reporting child neglect or abuse in good faith.[17]

This incentive plus the acknowledgement that fear of suit is often cited as a reason not to report led to a situation where today "all states specifically grant mandated reporters immunity from civil and criminal liability for good faith reports."[18] The clear implication for all educators appears to be that a report submitted without malice is provided immunity.

WHAT ABOUT CONFIDENTIALITY OF RECORDS?

One of the key concerns about the reporting of a suspected case of child abuse relates to whether a report to a given social service or law enforcement agency violates the concept of confidentiality of records. In general, the answer appears to be that there is little, if any, risk of violation.

In 1972 the federal Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment, was passed by Congress and established a series of rules dealing, in part, with the concern that school records and written documentation cannot ordinarily be released without parental consent. Since a report will typically be made based on observation, personal knowledge or information not contained in school records, the Act does not apply to such a report. If school records are drawn into account, there are "several clear exceptions that absolve the school of the requirement of obtaining prior parental consent when disclosing information from school records."[19]

The first exception occurs "in a health or safety emergency" where:

> *An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health and safety of the student or other individuals.*[20]

HEW has taken the position, under this section, that states which did not have child abuse statutes before November 19, 1974, may disclose information if school personnel determine, on a case-by-case basis, that a health or safety emergency exists.[21]

A second blanket exception is noted where states have reporting laws adopted prior to November 19, 1974. In these states written records may be released without parental approval.[22] Third, a school can release information to comply with a judicial order or lawfully issued subpoena These comments have led the Education Commission of the States to suggest that "FERPA does not represent a conflict to compliance with the reporting requirement of most child abuse and neglect statutes."[23]

Table I. State Reporting Laws and Immunity

Source: Child Abuse and Neglect: State Reporting Laws DHHS Pub. No. OHDS 80-30265, Dec. 1979. pp.8-9,11

	WHO MUST REPORT					
	Teachers Direct or by Inference	Other School Personnel	"Any Person" or "Any other Person"	Who May Report (Permissive)	Criminal Imm. in Making of a Report	Civil Imm. in Making of a Report
Alabama	X	X		X	X	X
Alaska	X			X	X	
Arizona	X	X			X	X
Arkansas	X	X		X	X	X
California	X	X		X	X	X
Colorado	X	X		X	X	X
Connecticut	X	X	X		X	X
Delaware	X	X	X		X	X
District of Columbia	X	X		X	X	X
Florida	X		X		X	X
Georgia	X	X		X	X	X
Hawaii	X			X	X	X
Idaho	X		X		X	X
Illinois	X	X		X	X	X
Indiana			X		X	X
Iowa	X	X		X	X	X
Kansas	X	X		X	X	X
Kentucky	X	X	X		X	X
Louisiana	X		X	X	X	X
Maine	X	X		X	X	X
Maryland	X	X			X	X
Massachusetts	X	X		X	X	X
Michigan	X	X		X	X	X
Minnesota	X	X		X	X	X
Mississippi	X	X			X	X
Missouri	X	X		X	X	X
Montana	X		X		X	X
Nebraska	X	X	X		X	X
Nevada	X	X		X	X	X
New Hampshire	X	X	X		X	X
New Jersey			X		X	X
New Mexico	X		X		X	X
New York		X		X	X	X
North Carolina	X	X			X	X
North Dakota	X	X		X	X	X
Ohio	X	X		X	X	X
Oklahoma			X		X	X
Oregon	X	X			X	X
Pennsylvania	X	X		X	X	X
Rhode Island			X		X	X
South Carolina	X	X		X	X	X
South Dakota	X	X		X	X	X
Tennessee			X		X	X
Texas			X		X	X
Utah			X		X	X
Vermont				X	X	X
Virginia	X	X		X	X	X
Washington	X	X		X	X	X
West Virginia	X	X		X	X	X
Wisconsin	X	X		X	X	X
Wyoming			X		X	X
American Samoa	X	X		X	X	X
Guam	X	X		X	X	X
Puerto Rico	X	X	X		X	X
Virgin Islands	X	X		X	X	X

TABLE II. Reporting Procedure*

States and Territories	Orally, Followed By Writing	Time When Writing is Due	As Soon As Possible (ASAP) or Not Specified (NS)	Orally Only	Orally or in Writing	Orally, Then in Writing if Requested	Time When Due, If Requested	Procedure Not Specified	Receipt of Report — Social Services Agency	Law Enforcement Agency	Other Agency
Alabama	X		NS						X	X	X
Alaska								X	X*		
Arizona								X	X	X	
Arkansas						X	48 hours		X		
California	X	36 hours							X	X	X
Colorado	X		NS						X	X	
Connecticut	X*	72 hours							X	X	
Delaware						X	NS*		X		
District of Columbia						X	NS		X	X	
Florida	X		ASAP						X		
Georgia						X	NS		X*		
Hawaii	X		ASAP						X		
Idaho								X*		X	
Illinois	X	24 hours							X		
Indiana				X					X	X	
Iowa	X*	48 hours							X		
Kansas						X	NS				X
Kentucky						X	48 hours		X*		
Louisiana	X	5 days							X	X	
Maine						X	48 hours		X		
Maryland	X	48 hours							X	X	
Massachusetts	X	48 hours							X		
Michigan	X	72 hours							X		
Minnesota	X		ASAP						X	X	
Mississippi	X		ASAP						X		
Missouri	X	48 hours							X		
Montana								X	X		X
Nebraska	X		NS							X	
Nevada	X		ASAP						X	X	X
New Hampshire						X	48 hours		X		
New Jersey								X	X		
New Mexico								X	X		X
New York	X	48 hours							X*		X
North Carolina					X				X		
North Dakota					X	X	48 hours		X		
Ohio						X	NS		X	X	X
Oklahoma	X		ASAP						X		
Oregon				X					X	X	
Pennsylvania	X	48 hours							X		
Rhode Island	X		NS						X		
South Carolina				X					X	X	
South Dakota				X					X		X
Tennessee								X	X	X	X
Texas	X	5 days							X	X	X
Utah						X	48 hours		X	X	
Vermont	X	7 days							X		
Virginia	X		NS						X		
Washington						X	NS		X	X	
West Virginia						X	48 hours		X		
Wisconsin						X	NS		X	X	
Wyoming						X	NS		X	X	
America Samoa						X	48 hours				X
Guam	X	48 hours							X		
Puerto Rico								48*	X		
Virgin Islands						X	48 hours				X

Source: Child Abuse and Neglect: State Reporting Laws (DHHS Pub. No. (OHDS) 80-30265), December, 1979. p. 18.

* See state statute for further implication.

STATE LAWS AND REGULATIONS

Due to the fact that the requirements of reporting laws differ in each state, the authors would like to share with the readers two insightful tables compiling information developed by the National Center on Child Abuse and Neglect. It is hoped that these tables and the recommendations which follow can assist principals in preventing child abuse and neglect.

RECOMMENDATIONS

1. Carefully review the January 1975, Legal Memorandum on Negligence, with special emphasis on the sections on errors of omission and suggestions for principals.

2. Know your state statute regarding child abuse and neglect, with particular attention to identification and reporting processes. Be sure to keep updated on your current state laws. Many are undergoing frequent change.

3. Have an inservice presentation(s) on child abuse and neglect prevention in which identification, reporting, and all other issues are discussed. Seek external agency personnel and law officers in your state to provide the basis of the program and potential follow-up.

4. Add a specific section to the faculty handbook dealing with the reporting function of your state statute and the responsibility of school personnel within the constraint of the law. Discuss the section as part of a normal faculty meeting in addition to inservice presentations, etc.

5. Be aware that some persons consider school corporal punishment as an example of child abuse. (See Irwin Hyman, "Corporal Punishment in the Schools: America's Officially Sanctioned Brand of Child Abuse," Child Abuse and Neglect: Issues on Innovation and Implementation. DEH Publication No. [OHDS] 78-30147, 1978, Vol. 1, pp. 138-142.) As a practical matter, avoid unnecessary physical contact with students and carefully obey the laws of your state and district concerning corporal punishment.

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FOOTNOTES

[1] U.S. Dept. of HEW National Center on Child Abuse and Neglect, Leaders' Manual-A Curriculum on Child Abuse and Neglect. (DHEW Publ. OHDS 79-30220, Washington: Government Printing Office, 1979, p. 47.)

[2] Diane D. Broadhurst, The Educator's Role in the Prevention and Treatment of Child Abuse and Neglect. Department of HEW Center on Child Abuse and Neglect, DHEW Pub. OHDS 79-30172. Washington: Government Printing Office, 1979, p.6.

[3] Wyoming sets the upper limit at age 16. Further, as Child Abuse and Neglect: State Reporting Laws. DHHS OHDS 80-30265, Dec. 1979, p.6 notes:

> Several jurisdictions qualify their age limit or include separate considerations in their laws. Delaware and American Samoa include mentally retarded persons, regardless of age. Ohio sets the age at under 18 years or any crippled or otherwise physically or mentally handicapped child under 21. Washington's law applies to adult developmentally disabled persons, and Nebraska extends protection to incompetent or disabled persons. Tennessee's law refers to a person under 18 years or persons who are reasonably presumed to be under 18 years. North Dakota's law applies to a person who is under 18 years and is neither married and cohabiting with spouse nor in the military service. Texas refers to a person under 18 years who has not been married or had his disabilities of minority removed for general purposes.

[4] Vermont.

[5] Broadhurst, op. cit., p. 6.

[6] Ill. Ann. Stat., ch. 23 §2054.

[7] Tex. Fam. Code Ann., §34.01-.06.

[8] Tex. Fam. Code Ann., §34.01

[9] Nebr. Rev. Stat., §28-711.

[10] Douglas J. Besharov, "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect," Villanova Law Review, Vol. 23, 1977-78, p. 481.

[11] W. Prosser, Law of Torts §36 (4th ed. 1971).

[12] Leaders Manual, op. cit., p. 203.

[13] Two states, Maryland and Maine, give mandated reporters discretion not to make reports under certain conditions. See Md. Code Ann. Act 72A, 6 (c) or Me. Rev. Stat. Titl 22 §3853 (1).

[14] Civil No. 37607 Calif. Supreme Court, Leaders Manual, op. cit., p. 203.

[15] 131 Calif. Rptr. 69, 551 P. 2d 389 (1976).

[16] Education Commission of the States. Education Policies and Practices Regarding Child Abuse and Neglect: 1978 p.6.

[17] Leaders Manual, op. cit., p. 203.

[18] Besharov, op. cit., p. 475.

[19] Child Abuse and Neglect. Dept. of HEW, Sept. 1977, p.2.

[20] 45 CFR subtitle A, §99.36 (a).

[21] Education Commission of the States, Status Report: Child Abuse and Neglect Report Requirements--The "Buckley Amendment" and the Public Schools, March 1979.

[22] Ibid.

[23] Ibid.

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